No. 80-934

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that at their trial for mail fraud the district court committed reversible error in refusing to instruct the jury on the possibility of finding multiple schemes to defraud.

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of mail fraud, in violation of 18 U.S.C. 1341, and of making false material statements with respect to a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001.[1] The court of appeals affirmed (Pet. App. 1a-17a; 624 F. 2d 1303).

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[1]One count charging conspiracy to restrain competition, in violation of Section 1 of the Sherman Act (15 U.S.C. 1), was severed prior to trial. Petitioners Alois Luhr and Luhr Bros. were each convicted of 28 mail fraud and two false statement counts. Each was fined $48,000, and Alois Luhr received concurrent suspended three-year sentences. Petitioners

The evidence, as summarized in the opinion of the court of appeals (Pet. App. 7a-8a), showed that petitioners and their co-defendants were involved in a scheme to allocate bids for river bank stabilization projects awarded by the United States Army Corps of Engineers between 1964 and 1978. Four river contractors testified for the government concerning pre-bid allocation meetings that took place over a period of several years and in a number of different cities. The essential operation of the scheme remained constant. The river contractors would collectively agree on which contractor would be awarded a particular Corps job. The other participants in the scheme would then either submit noncompetitive bids or would not bid at all for the contract. While participants in individual aspects of the scheme varied somewhat over the years, there remained a high level of commonality overall. For example, petitioner Alois Luhr was placed in the center of the scheme during the entire period and throughout the geographical area covered by the scheme, and petitioner Mathis was involved in several allocation discussions in different cities.

2. On appeal, the defendants challenged their convictions for mail fraud, claiming that there was a prejudicial variance between the proof at trial, which the defense asserted established the existence of multiple, isolated schemes to defraud, and the allegations of the indictment, which charged a single fraudulent scheme. The court of appeals rejected this claim (Pet. App. 7a), finding that "the evidence clearly supported the conclusion of a single scheme with a common goal, operations carried out in

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Mack Mathis and Bertucci Construction were each convicted of ten mail fraud and four false statement counts. Each was fined $50,000, and Mathis received concurrent suspended three-year sentences. Two co-defendants, W. Kent Ford and Ford Construction Company, did not appeal their convictions. Another co-defendant, Charles L. Rodgers, has not sought review by this Court of the court of appeals' affirmance of his conviction. Nineteen other co-defendants entered pretrial pleas of guilty or nolo contendere.

virtually identical manner, and an overlapping of participants." In addition, the court rejected the defendants' related contention that the district court erred in declining specifically to instruct the jury on the possibility of finding multiple schemes to defraud (*id.* at 8a-9a). It was sufficient, the court held, that the trial judge had carefully instructed "that no individual could be found guilty of mail fraud unless the government proved beyond a reasonable doubt that he 'knowingly and willfully devised or intended to devise or joined a scheme to defraud substantially the same as the one alleged in the indictment' " (*id.* at 9a; emphasis deleted).[2]

3. Petitioners contend (Pet. 5-6) that the district court should have given a specific instruction with respect to the procedures for determining guilt or innocence if the jury were to find that the evidence established the existence of multiple conspiracies, rather than the single conspiracy that was charged. They claim that the court of appeals' refusal to reverse their convictions for failure to so instruct the jury conflicts with the decisions of the Seventh Circuit in *United States* v. *Varelli*, 407 F. 2d 735 (1969), and the Ninth Circuit in *United States* v. *Eubanks*, 591 F. 2d 513 (1979).

There is no conflict. In *United States* v. *Abraham*, 541 F. 2d 1234, 1238-1239 (7th Cir. 1976), cert. denied, 429 U.S. 1102 (1977), the Seventh Circuit made it clear that the

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[2]The court of appeals also rejected the defendants' claim that their right to a fair trial was violated by the prosecutors' suggestion that Corps of Engineers employees speak with defense lawyers only in the presence of Justice Department or Corps attorneys (Pet. App. 16a). When this situation was called to the attention of the district court, it ordered a two month continuance and directed the Corps to inform its employees of their freedom to talk with defense counsel. During that period, the defense interviewed all Corps employees who consented and listed several employees as potential defense witnesses. The court of appeals concluded that the actions of the district court rectified any possible prejudice to the defense.

failure to instruct on multiple conspiracies does not necessarily amount to reversible error. The Court interpreted *Varelli* as encouraging, but not requiring, a multiple conspiracy instruction when the evidence would permit a finding of either a single conspiracy or multiple conspiracies. The Ninth Circuit in *Eubanks* did not hold that the district court committed reversible error in declining to instruct the jury on multiple conspiracies in a case where the indictment charged a single conspiracy. Rather, after ordering a new trial on other grounds, the court addressed the multiple conspiracy instruction issue to aid the district court on remand, and it declared that the evidence warranted an instruction on the possibility of multiple conspiracies (591 F. 2d at 518).[3] The First, Second, and Tenth Circuits are in accord that the failure of the trial court to instruct on the possibility of finding multiple conspiracies at variance with a single conspiracy alleged in the indictment is not automatic reversible error. *United States* v. *Levine*, 569 F. 2d 1175, 1178 n.6 (1st Cir.), cert. denied, 436 U.S. 928 (1978); *United States* v. *Lam Lek Chong*, 544 F. 2d 58, 67-68 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Watson*, 594 F. 2d 1330, 1340 (10th Cir.), cert. denied, 444 U.S. 840 (1979).

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[3]None of the remaining Ninth Circuit decisions cited by petitioners (Pet. 5-6) holds that a failure to give a multiple conspiracy instruction when the evidence is sufficient to prove a single conspiracy constitutes error. *United States* v. *Thomas*, 586 F. 2d 123, 132 (9th Cir. 1978), simply indicated approval of multiple conspiracy instructions given by a trial judge when the evidence warranted such an instruction. *United States* v. *Bracy*, 566 F. 2d 649, 657-658 (9th Cir. 1977), cert. denied, 439 U.S. 818 (1978), held only that the evidence was sufficient to prove the defendants' participation in a single conspiracy. *United States* v. *Griffin*, 464 F. 2d 1352, 1357 (9th Cir.), cert. denied, 409 U.S. 1009 (1972), held that where the government's evidence established the existence of five separate conspiracies instead of the single conspiracy charged, any possible prejudice that may have been caused by the variance was cured by the trial court's instruction that if the jury were to find multiple conspiracies, it could still find the defendants guilty, but only if it considered the evidence against each defendant separately.

Moreover, contrary to petitioners' suggestion (Pet. 5-6), the court of appeals' decision is not inconsistent with *Kotteakos* v. *United States*, 328 U.S. 750 (1946). In that case this Court held that where the evidence admittedly showed eight separate and distinct conspiracies and only a single conspiracy was alleged in the indictment, the variance between the proof at trial and the indictment was not harmless error. In the present case, by contrast, the evidence was ample to prove the single scheme alleged in the indictment (see Pet. App. 7a-8a).[4]

4. Petitioners' argument (Pet. 7-11) that the court of appeals' decision allows "witness intimidation" is frivolous. Whether or not it was improper for the prosecutors to advise Corps employees not to talk to the defendants unless a Corps or Justice Department lawyer was present, the district court effectively remedied any possible harm. It granted a two-month continuance of the trial, and it made it clear to Corps employees that they could talk freely to the defense (see note 2, *supra*). As a result, the defendants "interviewed all Corps employees who consented and several

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[4]The Court in *Kotteakos* noted (328 U.S. at 767-769) that the trial court's instructions compounded the variance problem by treating the evidence as having shown only one conspiracy. But the Court did not affirmatively hold that a district court is required to instruct the jury concerning the possibility of finding multiple conspiracies where, as here, only one conspiracy is charged and the proof is sufficient to establish the existence of that conspiracy.

were listed as potential defense witnesses" (Pet. App. 16a). In these circumstances, the court of appeals correctly concluded that the defendants were not prejudiced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981